the trust fails, for no *cestui que trust* is named and no contingency provided to determine one. It has been suggested that no constructive trust should be raised while the trustee is willing to use the property as the testator directed.[6] Perhaps a sufficient answer is that equity, following the law, should allow no restrictions on the use of property except by contract or by conditions, and that unless justice requires the creation of a conditional estate without words of condition in the instrument, a resulting trust must arise for the heirs.[7]

The principle which allows a *cestui* to be changed on any contingency seems to have been overlooked in an early case where property was given on trust for beneficiaries to be selected by the trustee. The argument of counsel concerned itself mainly with the validity of the gift as a charitable trust, and, deciding that it was not, the court held it void for indefiniteness.[8] This decision, recently approved by the New York Appellate Division, has been almost universally followed. *Mount* v. *Tuttle*, 99 N. Y. App. Div. 433. But such a trust is really no more indefinite than one for an unborn child,[9] or for whomever the settlor may appoint.[10] Until the child is born or the *cestui* appointed, the beneficial interest results to the grantor.[11] He is the definite *cestui que trust* till another definite *cestui* is determined by the happening of the contingency. The new *cestui* takes by force of the instrument of conveyance, and there seems no reason on principle why the contingency should not be allowed simply because it happens to be an appointment by the same person who holds the legal title as trustee.

It has been urged in support of the decision that the direction to appoint the beneficiary is mandatory and that "the law does not allow of irrevocable mandates."[12] But the cases cited in support of this proposition show only that a principal can always discharge his agent.[13] This is because a conveyance through an agent is really a conveyance by the principal, and until consummated the principal can change his method at will. But the direction to choose a beneficiary is not like the command to an agent to make a conveyance; it is rather the means provided by the testator to determine for whose benefit the will shall operate. It is similar to the case where an executor is directed to sell the land; the vendee gets title by the will, and the heir cannot revoke the mandatory direction.[14]

THE DOCTRINE OF ORIGINAL PACKAGES. — State statutes prohibiting the sale of an article which is a legitimate subject of interstate commerce, or taxing it to discourage its sale, were early declared unconstitutional in so far as they tended to regulate interstate commerce.[1] It was recognized, however, that if carried to its full extent this constitutional protection must interfere unreasonably with the legitimate powers of the state. If strictly

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[6] See 5 HARV. L. REV. 389.

[7] Cases are reviewed in 15 HARV. L. REV. 515. Some are on their facts supportable as charitable trusts, some as provisions for funeral expenses.

[8] Morice *v.* Bishop of Durham, 10 Ves. Jun. 521.

[9] Hopkins *v.* Hopkins, Cas. *t.* Talb. 43.

[10] Clere's Case, 6 Co. 17 b.

[11] *Ibid.*

[12] See 15 HARV. L. REV. 512.

[13] See cases cited in 15 HARV. L. REV. 513, n. 1.

[14] Y. B. 9 Hen. VI. 24 b, *per* Bobington, J.

[1] Brown *v.* State of Maryland, 12 Wheat. (U. S.) 419 (1827).

construed, it must protect foreign goods as long as they can be identified, since any prohibition of sale must interfere with importation. Chief Justice Marshall, declaring that some limitation was necessary, tentatively suggested, as the point beyond which the constitutional immunity of imported articles from taxation should not extend, the time "when the goods become mixed with the general property of the state." This has been the recognized criterion ever since, but its indefiniteness has made it difficult to apply.

Seizing on some words in the same opinion which might not have appeared had they not formed part of the statute there construed, later courts sought to establish a more specific line of distinction. Reasoning that packages in the hands of the importer are not mixed with the general property, and that, unless at least one sale is permitted, importation must cease, they considered the earlier case as laying down the rule that measures designed to discourage sale must not be permitted to prevent sale by the importer in the "original package." [2] When importers diminished the size of the shipping packages, so that they were convenient for ordinary retail sales, it became clear that a strict enforcement of the rule so declared, while not beyond the power of the constitution, must interfere with the state's powers of internal regulation to an extent inconsistent with the policy of the court. Lower courts, in dealing with the question, first escaped the difficulty by holding that open boxes, in which the packages were handled, even though they were furnished by the carrier, were the original packages within the rule, and were broken by the sale of separate packages.[3] When the persevering importer shipped the small packages loose, avoiding the use of any box or basket, it was sought to confine the doctrine to packages suitable for wholesale trade.[4] In a decision disallowing that distinction, the federal Supreme Court suggested a further self-imposed limitation on its powers, — that no protection will be extended to original packages whose size has been reduced below that of the customary shipping package, merely for the purpose of escaping state legislation.[5] This was one of the grounds on which a later case was decided,[6] and its unequivocal enunciation in a recent decision of the same court marks its definite establishment in our law. *Cook* v. *County of Marshall*, 25 Sup. Ct. Rep. 233. As has been pointed out in several cases by a consistent group of dissenting justices, it is no less a regulation of interstate commerce to stop the shipment of tobacco in small packages than in large, and the unwillingness of the importer to pay a tax or fine does not prevent his traffic in legitimate articles from being properly classed as interstate commerce. The rule, however, is based on the same principle which was recognized when the constitutional protection was originally limited to goods unmixed with those of the state, in that it gives the state certain independent and necessary powers of regulation, which must be denied if the letter of the law is to prevail.

POWER OF A CORPORATION TO PURCHASE ITS OWN SHARES. — That a corporation has no authority to make a business of trafficking in its own

[2] Leisy *v.* Hardin, 135 U. S. 100 (1890).
[3] Austin *v.* State, 101 Tenn. 563; *In re* Harmon, 43 Fed. Rep. 372.
[4] Commonwealth *v.* Schollenberger, 156 Pa. St. 201. But see Keith *v.* State, 91 Ala. 2; Sawrie *v.* State, 82 Fed. Rep. 615.
[5] Schollenberger *v.* Pennsylvania, 171 U. S. 1 (1898).
[6] Austin *v.* Tennessee, 179 U. S. 343 (1900).